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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 TYLER JAMES SUONG,

12 Petitioner,

13 v.

14 CRAIG KOENIG,

15 Respondent.

Case No. 1:20-cv-00347-EPG-HC

FINDINGS AND RECOMMENDATION TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT COURT JUDGE

16  
17 Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus  
18 pursuant to 28 U.S.C. § 2254. In the instant petition, Petitioner challenges one of his 2007  
19 convictions in the Fresno County Superior Court for committing a lewd act against a minor. As  
20 Petitioner has sought federal habeas relief with respect to the challenged conviction previously,  
21 the undersigned recommends that the petition be dismissed pursuant to 28 U.S.C. § 2244(b) as an  
22 unauthorized successive petition.

23 **I.**

24 **DISCUSSION**

25 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a  
26 habeas petition and allows a district court to dismiss a petition before the respondent is ordered  
27 to file a response, if it “plainly appears from the petition and any attached exhibits that the  
28 petitioner is not entitled to relief in the district court.” A federal court must dismiss a second or

1 successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The  
2 court must also dismiss a second or successive petition raising a new ground unless the petitioner  
3 can show that (1) the claim rests on a new, retroactive, constitutional right, or (2) the factual  
4 basis of the claim was not previously discoverable through due diligence, and these new facts  
5 establish by clear and convincing evidence that but for the constitutional error, no reasonable  
6 factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C.  
7 § 2244(b)(2)(A)–(B). However, it is not the district court that decides whether a second or  
8 successive petition meets these requirements.

9       Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by  
10 this section is filed in the district court, the applicant shall move in the appropriate court of  
11 appeals for an order authorizing the district court to consider the application.” In other words, a  
12 petitioner must obtain leave from the Ninth Circuit before he can file a second or successive  
13 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656–57 (1996). This Court must  
14 dismiss any second or successive petition unless the Court of Appeals has given a petitioner  
15 leave to file the petition because a district court lacks subject-matter jurisdiction over a second or  
16 successive petition. Burton v. Stewart, 549 U.S. 147, 157 (2007).

17       In the instant petition, Petitioner challenges one of his 2007 convictions in the Fresno  
18 County Superior Court for committing a lewd act against a minor. (ECF No. 1 at 1, 5, 17).<sup>1</sup>  
19 Petitioner previously sought federal habeas relief in this Court with respect to the same  
20 conviction twice. See Suong v. Cate, No. 1:11-cv-01480-LJO-JLT (dismissed as untimely);  
21 Suong v. Hatton, No. 1:17-cv-01749-DAD-SAB (dismissed as successive). Accordingly, the  
22 Court finds that the instant petition is “second or successive” under 28 U.S.C. § 2244(b). See  
23 McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding “dismissal of a first habeas  
24 petition for untimeliness presents a ‘permanent and incurable’ bar to federal review of the  
25 underlying claims,” and thus renders subsequent petitions “second or successive”).

26       As Petitioner has already filed petitions for writ of habeas corpus regarding his 2007  
27 conviction, he cannot file another petition in this Court regarding the same conviction without

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28 <sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 first obtaining permission from the United States Court of Appeals for the Ninth Circuit. Here,  
2 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file his  
3 successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's renewed  
4 application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S.  
5 at 157.

## 6 II.

### 7 RECOMMENDATION & ORDER

8 Accordingly, the undersigned HEREBY RECOMMENDS that the petition for writ of  
9 habeas corpus be DISMISSED.

10 Further, the Court DIRECTS the Clerk of Court to assign a District Court Judge to the  
11 present matter.

12 This Findings and Recommendation is submitted to the assigned United States District  
13 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
14 Rules of Practice for the United States District Court, Eastern District of California. Within  
15 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file  
16 written objections with the court and serve a copy on all parties. Such a document should be  
17 captioned "Objections to Magistrate Judge's Findings and Recommendation." The assigned  
18 United States District Court Judge will then review the Magistrate Judge's ruling pursuant to 28  
19 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified  
20 time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d  
21 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22 IT IS SO ORDERED.  
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24 Dated: **April 1, 2020**

25 /s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE